No. 11,327

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL A. PORTER, Administrator, Office of Price Administration,

Appellant,

vs.

KENNETH W. TROWBRIDGE, doing business as Kenneth W. Trowbridge Co., and Precision Motor Parts,

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR APPELLEE.

May it please the Court:

The presentation of the case by appellant in this Court follows the pattern of looseness, vagueness and inaccuracy of his presentation in the Court below.

He says at his page 2, "The judgment dismissing the action was entered on December 10, 1945. (R. 41.)" That reference, however, is merely to an "order for judgment", which is not the judgment. (*Haddock v. Pillsbury,* 9 Cir., 155 F. 2d 820.) We will therefore state the judgment in our Statement of the Record, infra.

Under his "Statement of Facts" (his pages 2 to 4) there is an entire omission of his answers to our interrogatories, and we will therefore state them under our Statement of the Record, infra.

His quotation of the "Stipulation" at his pages 3 and 4 is incomplete, through his deletion of a paragraph numbered 3. The stipulation is not to be read merely alongside the complaint, but under and in connection with appellant's answers to our interrogatories.

We therefore precede our argument with the following statement.

STATEMENT OF THE RECORD.

The complaint.

The complaint is an OPA stereotype amounting to little or nothing more than notice[1] pleading but nonetheless invulnerable to any motion to dismiss[2] grounded under

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[1]See discussion by Judge Ford before a Judicial Conference of the Sixth Circuit, 1 F.R.D. 315 et seq. Also the paper, "Simplified Pleading", 2 F.R.D. 456, et seq., by Judge Charles E. Clark, who has been a member of the Advisory Committee from the beginning. And see Whittier, *Notice Pleading,* 31 Harv. L. Rev., 501-522.

[2]There has been a revolution in pleading. *Leimer v. State Mutual Life Assur. Co.,* 8 Cir., 108 F. 2d 302, has become the leading case. Therein, at 306, Judge Sanborn ruled that under the new Rules "there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a *certainty* that the plaintiff would be entitled to no relief under *any* state of facts which could be *proved* in support of the claim". In substantially adopting that statement of the rule in the Fourth Circuit, in *Tahir Erk v. Glenn L. Martin Co.,* 116 F. 2d 865, 870, Judge Dobie (who has been a member of the Advisory Committee from the beginning) added: "In Hubbock v. Wilkenson, 1899, 1 Q.B. 86, 91 (C.A.), the court construed the equivalent of a motion to dismiss under the Judicature Act of 35 & 36 Vict. c. 66 (1873) (in

Rule 12(b) FRCP upon "failure to state a claim upon which relief can be granted". After stating the jurisdictions of the Court and of the appellant, the identity of the price regulation as MPR 452 as amended, and identity of defendant-appellee as a manufacturer of "rebuilt automotive parts", the "claim" states[3] that (R. 3-4),

> "Subsequent to" September 2, 1943 "defendant * * * sold * * * rebuilt automotive parts at prices in excess of" MPR 452 as amended. * * * "None of the said purchases was made for use or consumption other than in the course of trade or business[4] * * *.
>
> Three times the aggregate amount" of the excess "equals $25,077.00",

for which amount he prayed judgment. Appellee moved (R. 5) for particulars of that aggregate but the motion

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which Act there is found the roots of our present motion to dismiss), and stated that such order would be proper only where '* * * any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks.' See, also, Burstall v. Beyfus, 1884, 26 Ch.D. 35, 38." One or the other or both of the foregoing cases has been followed by citation in the Ninth Circuit (*Pierce v. Wagner*, 134 F. 2d 958, at 960 (and see the OPA complaint approved in *Bowles v. Glick Bros. Lumber Co.*, 9 Cir., 146 F. 2d 566)), and in the Fifth, Seventh and Tenth Circuits (*Kohler v. Jacobs*, 5 Cir., 138 F. 2d 440, 441; *Carroll v. Morrison Hotel Corp.*, 7 Cir., 149 F. 2d 404, 406; *Garbott v. Blanding Mines Co.*, 10 Cir., 141 F. 2d 679). As said in *U. S. v. Atlantic Basin Iron Works*, 53 F. Supp. 268, 271, a complaint "should not be dismissed, although as a pleading it is manifestly deficient". And *In re Stroh*, 52 F. Supp. 958, at 961: "Since the adoption of the Federal Rules * * * the theory of pleading in the federal courts has been completely changed."

[3]In two counts. Our statement collects the whole of the two.

[4]It was held in *Provisional Government of French Republic v. Cabot*, 59 F. Supp. 855, at 857, point 4, that this sentence "is a pure conclusion of law", but in the course of reversal in *Bowles v. Cabot*, 2 Cir., 153 F. 2d 258, at 260, col. 2, it was said, "That the Administrator chose to draw his complaint in the words of the statute is not objectionable."

was denied.[5] The denial was by Hon. A. F. St. Sure, the learned judge of the Court below who in an early case under the new Rules of Pleading, *Securities and Exchange Commission v. Timetrust, Inc.,* 28 F. Supp. 34, at 41 and 43, had said in June, 1939:

> "The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved. A generalized summary of the case that affords fair notice is all that is required. * * * Defendants' motion for a more definite statement or bill of particulars should be denied. If defendants need more definite or detailed information about the claim, they may obtain it through Rules 33 to 37, which provide a simple and expeditious method of discovery."

The implicit basis of such denial of issuable particulars is the rule that a motion before answer for a bill of particulars is addressed to the sound judicial discretion of the Court.[6] The test has come to be stated as follows:[7]

> "Rule 8(a)(2) must be kept in view in the administration of the other rules governing pleadings. And a plaintiff who, in compliance with it, has presented in his complaint 'a short and plain statement of the claim showing that the pleader is entitled to relief,' must be accorded immunity to a motion for a bill of particulars except to the extent that he may have stated

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[5]See R. 47, docket entry under October 9, 1944.

[6]The rule of discretion, both before and since the new Rules, is well stated and many Federal authorities collected by Judge Delehant in *U. S. v. Association of American Railroads,* 4 F.R.D. 510, at 528 to 530. And see 1 Moore, *Fed. Prac.* 656. It was stated in *Whitaker v. Whitaker Iron Co.,* 238 Fed. 980, at 993, that the discretion extends "to whether particulars shall precede discovery, or discovery precede particulars".

[7]Idem, 4 F.R.D. at 529.

his claim 'in such general terms that defendant can not understand the general nature of the charges and can not frame an answer' to them. Martz v. Abbott, D.C. Pa., 2 F.R.D. 17; Smith v. Buckeye Incubator Co., D.C. Ohio, 2 F.R.D. 134; Mitchell v. Brown, D.C. Neb., 2 F.R.D. 325; Best Foods v. General Mills, D.C. Del., 3 F.R.D. 275; Brinley v. Lewis, D.C. Pa., 27 F. Supp. 313; Walling v. Black Diamond Coal Mining Co., D.C. Ky., 59 F. Supp. 348."

U. S. v. Ass'n of American Railroads, 4 F.R.D. 510, 529.

Since the advent in 1942 of the statutory[8] OPA further particulars under complaints filed by it have been accordingly granted[9] or denied.[10] Particulars before answer hav-

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[8]The predecessor executive OPA was powerless to bring suit. See discussion in *Bowles v. American Distilling Co.,* 62 F. Supp. 20, at 23 and 24.

[9]*Bowles v. National Erie Corp.,* 3 F.R.D. 469; *Bowles v. Schultz,* 54 F. Supp. 708; *Bowles v. American Distilling Co.,* 62 F. Supp. 20; *Bowles v. Jacobson,* 4 F.R.D. 447; *Bowles v. Yankee Brewing Co.,* 4 F.R.D. 508; *Bowles v. Flotill Products Co.,* 4 F.R.D. 499; *Bowles v. Sebastopol Berry Growers Assn.,* 4 F.R.D. 502, modified 5 F.R.D. 178; *Bowles v. Deep Vein, etc. Co.,* 5 F.R.D. 140; *Bowles v. John F. Casey Co.,* 5 F.R.D. 143.

[10]*Bowles v. Karp,* 3 F.R.D. 327; *Bowles v. Curtiss Candy Co.,* 55 F. Supp. 527; *Bowles v. Anderson,* 4 F.R.D. 181; *Bowles v. Brazman,* 4 F.R.D. 318; *Bowles v. Brookside Distillery Products,* 4 F.R.D. 294; *Bowles v. Ohse,* 4 F.R.D. 403. In *Bowles v. Anderson,* 4 F.R.D. 181, it was said: "The object of a bill of particulars is to secure an amendment to the pleadings. However, as the judges have been saying, the office of the bill of particulars has become or is becoming obsolete. United States v. Hartmann, D.C., 2 F.R.D. 477. Bills of particulars are not favored. Klug v. Palmer et al., D.C., 2 F.R.D. 273. Moreover, the present Rules of Civil Procedure, 28 U.S.C.A. following section 723c, are now in process of amendment. The original rule in relation to bills of particulars (being a part of paragraph (e) of rule 12) has been entirely stricken out. The reason for the abandonment of the rule is that the identical information can be obtained more easily by interrogatories or any other of the discovery rules." For the history of change of attitude in the district courts, see *Ferrara v. Interstate*

ing been denied to him at bar appellee after[11] answering served interrogatories upon appellant. (R. 10.)

The issue under appellant's claim[12] as narrowed by him.

Justice Holtzoff[13] has recently stated in *Pierce v. Pierce,* 5 F.R.D. 125, that "One of the purposes of interrogatories

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Transit Lines, 5 F.R.D. 54. In *Galdi v. Jones,* 2 Cir., 141 F. 2d 984, at 992, col. 1, it is stated that the use of interrogatories, deposition or discovery is preferable to a motion under Rule 12(e) FRCP, and in marginal note 7 thereto it is added: "For a searching criticism of the misuse of Rule 12(e), see 1 Moore, *Federal Practice,* 1942 Supplement, 634-650."

[11]On October 6, 1944, the Court below adopted a new local rule numbered 26: "No interrogatories shall be served until after joinder of issue, unless for good cause the court orders otherwise." See Appendix A.

[12]The substitution of the word *"claim"* for the phrase, "the ultimate *facts* upon which the plaintiff asks relief", used in Rule 25 of the Equity Rules of 1912, and the alternative phrase, "the *facts* constituting the cause of action", as used generally in code pleading (see Calif. Code of Civil Procedure, § 426), was suggested in 1935 in Wheaton, *Manner of Stating a Cause of Action,* 20 Cornell Law Quarterly 185, at 209, and the Wheaton suggestion was adopted by Judge (then Professor) Charles E. Clark (who has been a member of the Advisory Committee from the beginning) in Clark and Moore, *A New Federal Civil Procedure: II. Pleadings and Parties* (1935), 44 Yale Law Journal 1291, at 1303, note 42. And see 1 *Moore, Fed. Prac.,* page 3. The purpose of the change is to reduce to or near the vanishing point trial and appellate rulings on pleadings with respect to the distinctions between evidentiary facts, ultimate facts, legal conclusions, and the meaning of "cause of action". "Now", say Clark and Moore, supra, at their page 1301, "it has come to be appreciated that the distinction is one between generality and particularity in stating the transaction sued upon and that considerable flexibility should be accorded the pleader". The next step is interesting: on August 23, 1946, the Advisory Committee submitted to the Supreme Court their "third and final" draft of proposed amendments, which *inter alia* eliminates motions for bills of particulars.

[13]Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure* (October, 1942), 41 Mich. L. R. 205-224, at 205,

is to narrow the issues''. He had in that case denied, before answer filed, a motion for a bill of particulars, but now granted a motion for an order that interrogatories be answered, ''for the purpose of expanding or specifying details of allegations contained in the complaint''. And so at bar, appellant ''narrowed the issue'' by his answers to our interrogatories; he specified the details of his ''claim'' as follows:

> ''Defendant * * * is a manufacturer of rebuilt automotive parts and accessories and as such subject to the Federal Manufacturer's Excise Tax. Prior to September 1, 1943,'' he ''failed and neglected to pay such tax. Defendant in accordance with specific instructions from the Bureau of Internal Revenue, commenced paying said Manufacturer's Excise Tax on all sales of rebuilt automotive parts and accessories beginning September 1, 1943. On'' that date he ''issued a new price list '6' cancelling price list '5'. Said price list set forth prices 5%[14] in excess of previous prices with a reference on the face of the catalog 'with Federal Excise Tax included'.'' [R. 13, Answers 3, 4 and 5.]

As stated supra, the complaint says that ''three times the aggregate amount * * * equals $25,077.00''. That is three times $8359.00. Appellant specified that that amount

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says: ''Discovery has three distinct purposes and uses. * * * These three uses of discovery are as follows:

(1) To narrow the issues, in order that at the trial it may be necessary to produce evidence only as to a residue of matters which are found to be actually disputed and controverted.

(2) To obtain evidence for use at the trial.

(3) To secure information as to the existence of evidence that may be used at the trial and to ascertain how and from whom it may be procured, as for instance, the existence, custody and location of pertinent documents or the names and addresses of persons having knowledge of relevant facts.''

[14]The excise tax was 5%.

"was determined from defendant's Manufacturer's Excise Tax Returns with the Bureau of Internal Revenue at San Francisco for the months" September 1943 to May 1944. [R. 12-13, Answers 3, 4 and 5.]

"The amounts of tax for each month as set forth on defendant's Excise Tax Returns filed with the Bureau of Internal Revenue in San Francisco, California, are as follows:

September, 1943	$ 938.81
October, 1943	1060.38
November, 1943	1025.15
December, 1943	1276.25
January, 1944	1062.99
February, 1944	1000.00
March, 1944	1000.00
April, 1944	935.49
May, 1944	59.93
Total	$8359.00

All of the Manufacturer's Excise Tax paid by defendant, doing business as Precision Motor Parts, during said months were for sales of rebuilt automotive parts and accessories during said months." [R. 14-15, Answers 3, 4 and 5.]

The excise tax.[15]

The "Manufacturer's Excise Tax" was levied by § 606 of the Revenue Act of 1932, and in an amended form was codified in 1939 in the Internal Revenue Code, § 3403, the relevant portions of which as amended by the Revenue Act of 1941, § 544(b), read:

> "§ 3403. There shall be imposed upon the following articles sold by the manufacturer, producer, or im-

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[15]The tax had a stormy history of controversy and litigation, which explains why it was that the Collector at last gave "specific instructions" (R. 13) to appellee to commence collecting and paying the tax "beginning September 1, 1943". In *Skinner v. U. S.* (1934), 8 F. Supp. 999 (retreading tires), the opinion at page 1003 quotes opinion-letters of the Commissioner of Internal Revenue at different dates in 1932 ruling that "the process of retreading the tires by vulcanization is held to be a repair rather than a manufacturing process". In February, 1933, the Commissioner reversed the ruling. The Court reversed the latter ruling of the Commissioner, saying (8 F. Supp. at 1003, col. 2):

> "The court is of the opinion that section 602 of the Revenue Act of 1932 was meant to apply only to newly manufactured tires and that it does not include retreaded tires, such as are involved in the instant case, and that, in holding that it does include such retreaded tires, the Commissioner of Internal Revenue has exceeded the authority granted him under the act, and that such an interpretation is not a proper interpretation of the act."

For seven years after the Act of 1932, the Court rulings were against the Commissioner's assertion of taxability. One such, *Armature Exchange, Inc. v. U. S.* (1939), 28 F. Supp. 10 (reconditioning armatures) listed the rulings as follows (28 F. Supp. at 15, col. 1):

> "Instances of repairs or restorations of parts of automobiles, some of the type here involved, others of a different type, which have been declared not to amount to 'manufacturing' are: *Retreading tires* (Skinner Tire & Rubber Co. v. United States, D.C., 1934, 8 F. Supp. 999); rebuilding armatures (Monteith Bros. Co. v. United States, D.C., Ind. 1936, 18 American Federal Tax Reports, 1320); *rebabbiting connecting rods* (Hempy-Cooper Mfg. Co. v. United States, D.C. Mo., 1937; 19 American Federal Tax Reports, 1313; Bardet v. United States, D.C. Cal. 1938, Prentice-Hall Federal Tax Current Court Decisions for 1938, Par. 5.507); *rebuilding gen-*

porter, a tax equivalent to the following percentages of the price for which so sold:

(a) [Covers automobile truck bodies, chassis trailers.]

(b) [Covers other automobile chassis and bodies and motor-cycles.]

(c) Parts or accessories * * * for any of the articles enumerated in subsection (a) or (b), 5 per centum."

In the Act levying the tax, it is enacted that in "determining the price for which an article is sold * * * there shall be *excluded* the amount of tax imposed by this title, whether or not stated as a separate charge", Revenue Act of 1932, § 619(a), now I.R.C. § 3441(a). That language is carried into the text of Regulations 46 (Excise Taxes) § 316.8. In the report (H.R. Report No. 708, 77th Cong., First Session) of the Committee of Ways and Means on the Revenue Bill of 1932, under the original section numbering of the Bill, it is said:

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erators and armatures (Becker-Florence Electric Co. v. United States, D.C. Mo., 1938, Prentice-Hall Federal Tax Service Current Court Decisions for 1939, Par. 5.161)."

Accord, *Con-Rod Exchange, Inc. v. Hendricksen* (1939), 28 F. Supp. 924. But in turn, beginning in December, 1939, there was a series of decisions in Circuit Courts of Appeals ruling in favor of the Commissioner's claim of "manufacture", i.e., taxability: *Clawson & Bals, Inc. v. Harrison*, 7 Cir., 108 F. 2d 991 (connecting rods); *U. S. v. Armature Exchange*, 9 Cir. (1941), 116 F. 2d 969 (rewound armatures); *U. S. v. Moroloy Bearing Service*, 9 Cir., 124 F. 2d 373 (connecting rods); *U. S. v. J. Leslie Morris Co.*, 9 Cir., 124 F. 2d 371; *U. S. v. Armature Rewinding Co.*, 8 Cir., 124 F. 2d 589 (armatures and generators); *Hendricksen v. Seward*, 9 Cir., 135 F. 2d 986 (*res judicata*); *Monteith Bros. Co. v. U. S.*, 7 Cir., 142 F. 2d 139. And see *Niagara Motors Corp. v. McGowan*, 45 F. Supp. 346.

"Section 604. Sale Price. Section 604 provides rules for determining the sale price which is the basis of the tax. In general, this should be the manufacturer's or producer's price at the factory or place of production. * * * The amount of tax under this title is to be excluded.

It is not intended to require the tax to be separately charged. If no separate charge is made, the tax is to be presumed to be included. For example, the invoice may specify the charge for the merchandise as $100, plus $2.25 for the manufacturers' tax, or it may simply state the charge as $102.25 for the merchandise and in either case the manufacturers' tax will be $2.25. This has been found in Canada to be the most workable plan and the fairest to industry in general."

Therefore, whether or not a manufacturer states the price separately from the tax, the tax is not a part of the price. "If no separate charge is made, the tax is presumed to be included", but that is only a presumption; and the presumption disappears (*Ariasi v. Orient Ins. Co.*, 9 Cir., 50 F. 2d 548) in the face of appellant's answer to interrogatories, that "defendant * * * did not add a Manufacturer's Excise Tax to his price on March 31, 1942". (R. 14.)

Maximum Price Regulation 452.

MPR 452, "Manufacturer's Maximum Price for Automotive Parts", was originally issued August 19, 1943, effective September 2, 1943. It "covers all new and rebuilt automotive parts", § 1(c), as to which it supersedes the General Maximum Price Regulation, § 2. It stated, § 3, that "on and after September 2, 1943 * * * (a) No

manufacturer shall sell or deliver a part at a price higher than the maximum price permitted by this regulation". It "divides sales into two kinds", § 5, (a) Sales of parts at list prices, and (b) Sales of parts at non-list prices, and as to the former said:

> "(a) Sales of parts at list prices. 'List price' as used in this regulation means the price for a manufacturer's sale of a part which may be derived from a price list or price sheet published and generally distributed to the trade by him. When a list price is named in this regulation as the maximum price to a purchaser, it means the price adjusted for all applicable extra charges, discounts or allowances for sales to a purchaser of the same class."

By § 6 maximum prices were set at the list price in effect on March 31, 1942, for those manufacturers, such as appellee, who had a price list in effect on March 31, 1942;[16] i.e., the technique of price control adopted as to rebuilt automobile parts was the base period technique.[17] § 6

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[16]Subsequently, by Amendment 4, released March 25, 1944, effective March 30, 1944, there was initiated, through addition of new § 8a, "a new method for pricing rebuilt automotive parts, other than rebuilt motors". The present litigation embraces the period antedating that new method.

[17]"These techniques fall into three general categories:

1. The *base period* technique provides that the maximum prices on the commodities in question are those charged or asked for in some previous period. * * *

2. The *cost-plus* pricing technique establishes maximum prices on the basis of current or other cost to the seller, plus some specified margin or mark-up. * * *

3. The specified *'dollars-and-cents'* pricing technique establishes a uniform maximum price for all sellers of a particular commodity, or for all sellers in a given category, or for all sellers in a given area. * * *" *Office of Price Administration*, Fourth Quarterly Report, for the period ended January 31, 1943, pp. 33-34.

says, "This section sets maximum prices for sales by a manufacturer who (1) had a price list for the part being priced in effect on March 31, 1942", at those list prices as his maximum prices. Under the heading "Miscellaneous", § 15 provided:

> "Sec. 15. Federal and State taxes. (a) Any tax levied by any statute of the United States or statute or ordinance of any state or subdivision thereof which the manufacturer on March 31, 1942, added to the price paid by the purchaser shall not be included in the maximum price if such tax is stated separately from the purchase price, except that such tax need not be stated separately if it is measured by the manufacturer's cost of the part.
>
> (b) Any tax upon the sale or delivery of a part and any compensating use tax upon a part levied by any statute of the United States or statute or ordinance of any state or subdivision thereof and becoming effective on or after March 31, 1942, may also be collected by the manufacturer making such taxable sale or delivery in addition to the maximum price if such tax is stated separately from the purchase price, unless the manufacturer had increased his price on or before March 31, 1942, to reflect such new or increased tax, except that such tax need not be stated separately if it is measured by the manufacturer's cost of the part. * * *"

The trial record.

At R. 48 the clerk's docket entries in year 1945 show that on August 16 when the case was on the calender for trial it was ordered continued to October 2 for a pretrial conference, and the entry for October 2 shows "Pre-

Trial Conf., cont Nov. 20, for trial"; on the latter day the entry reads, "Ord con Dec. 4 for trial, Filed ans.[18] to interrogos propounded by deft". The entry for Dec. 4 shows the trial ordered continued to the next day, Dec. 5, the entry for which reads, "Trial before the Ct sitting without a jury, submitted, Filed deft's trial memo".[19] No oral testimony is noted in the docket, because there was none. In the interim, the entry under November 21 shows, "Filed stip re adding Mfgs excise tax", and at R 27 and 28 the "Stipulation" appears and at the latter page shows a filing mark of November 21, 1945. The body of the stipulation reads:

> "1. On March 31, 1942, the defendant, doing business in the City and County of San Francisco, State of California, sold and offered to sell, as a manufacturer, rebuilt automotive parts. On said date, the Federal Manufacturers' Excise Tax was not added by defendant to the price paid by the purchasers of said rebuilt automotive parts; nor was said tax then considered or included by defendant in his calculation of producing costs as a basis of arriving at his ceiling prices.
>
> 2. Subsequent to the 2nd day of September, 1943, and prior to the filing of the Complaint in the above-

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[18]The answers by appellant to interrogatories put by appellee appear at R. 10 to 17, and at the latter page the filing mark appears as Nov. 20, 1945.

[19]This appears at R. 28 to 41, and at the latter page the filing mark appears as Dec. 5, 1945. It was a voluntary memorandum prepared by appellee in advance of the trial, and was written before the stipulation of facts was entered into. The memorandum was designed to expedite the trial by setting down appellee's views with respect to applicable law, for whatever aid the Court below might deem it afforded. Appellant did not reply to it nor argue the case either orally or in a brief in the Court below.

entitled action on the 2nd day of August, 1944, the defendant, doing business in the City and County of San Francisco, State of California, sold and offered to sell, as a manufacturer, rebuilt automotive parts at ceiling prices, and, in addition, defendant collected, from the purchasers thereof, sums totalling $8359.00 to cover the Federal Manufacturers' Excise Tax. None of said sales were made for use or consumption other than in the course of the trade or business of the purchasers.

3. This stipulation does not preclude either party from offering, at the time and place of trial of said action, any evidence not in conflict with the facts hereinbefore set forth."

Appellant's "designation of contents of record on appeal", R. 45, did not call for a reporter's transcript of the oral proceedings at the trial on December 5, and hence appellant's record leaves the matter to conjecture. Under Rule 75 FRCP the burden of obtaining such a transcript was and is upon appellant. However, there is enough in the appellate record to show that the Court below had before it (1) the stipulation, and (2) appellant's answers to our interrogatories put under Rule 33 FRCP. As to the latter it is said in *Adams v. Hendel,* 28 F. Supp. 317, 318, col. 2, that "information furnished under Rule 33 may become part of the trial record: information furnished in response to a motion [for a bill of particulars] under Rule 12(e) becomes part of the pleadings". At this point some confusion enters into the situation when trial Courts use interrogatories as a quasi-motion for particulars. We are at this point concerned with the *effect.*

There are some *obiter* statements[20] made as *arguendo* illustration of some ruling on something else, including *Bowles v. Safeway Stores,* 4 F.R.D. 469, wherein the OPA successfully opposed a motion for particulars and then sought to use the order of denial as *res judicata* against interrogatories put to the plaintiff Administrator, as to which the Court said (4 F.R.D. at 471):

> "It is no objection to interrogatories propounded under Rule 33, supra, that the same information was sought in a motion to make more definite and certain, or for a bill of particulars, and denied. Interrogatories are evidentiary in character. They are not considered as a pleading in the case. Until they are offered in evidence by either party they will not be considered by the Court. 27 C. J. S., Discovery, §§55-68, p. 86, etc. Pleadings deal with ultimate facts. The distinction in ruling the motion to make more definite and certain, or for a bill of particulars, and objections to interrogatories is obvious. A ruling on the former is not res adjudicata of the latter."

That, of course, was a preliminary ruling and did not sharply present the actual situation of a case then on trial. The matter is stated in its true light in Wigmore, *Ev.,* § 2122 read with § 2121, i.e., a distinction is drawn between use of answers to interrogatories in the *same* case, § 2122, and their use in a *different* case, § 2121. When used in the *same* case they operate as *judicial admissions*

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[20] *Coca Cola Co. v. Dixi-Cola Laboratories, Inc.,* 30 F. Supp. 275, 279, col. 2 ("because the answers do not become evidence in the case unless voluntarily introduced by the interrogator as admissions against interest on the part of the party interrogated"), quoted in *New England Terminal Co. v. Graver Tank & Mfg. Co.,* 1 F.R.D. 411, 414, col. 2, and cited in *Bowles v.. Keller Glove Mfg. Co.,* 4 F.R.D. 450, 451, col. 2.

in that case. As Street, *Fed. Eq. Prac.*, § 1596, said with respect to use in the *same* case: "the document being before the court, the only thing to be considered is its legal effect". The *obiter* expressions mentioned supra, and the citation to Corpus Juris in the passage quoted from *Bowles v. Safeway Stores*, supra, are sound only with respect to the rule governing use of the answers in a different case, and when sought to be read before a jury in the same case. The unification of law and equity procedure under the new rules has done away with the former pure bill of discovery[21] in aid of an action at law, so that now in all cases tried without a jury, the courts may judicially notice the judicial admissions of the interrogated party to the case. Judicial admissions are judicially noticed, i.e., they are without need of formal "offer in evidence":

> "It is argued for the appellees that the answer in this case was not offered in evidence on the trial and that the admissions therein pleaded are not to be considered against the defendants, but we think the contention is without merit. Admissions in the plead-

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[21]Street, *Fed. Eq. Prac.* § 1596, published in 1909, states the practice with respect to answers in the *same* case quite simply and clearly:

> "In the practice of our courts, the actual reading of the answer as evidence at the hearing is dispensed with. The introduction of the bill and answer as pleadings suffices to bring those documents before the court for every purpose for which they can be legitimately used in the cause. Accordingly we no longer read of disputes over the right to *read* parts of the answer as evidence for the plaintiff. The question always is whether such and such a statement in the answer operates as evidence in favor of the plaintiff and whether it is to be taken as being qualified by such and such other statements in the answer. In other words, the document being before the court, the only thing to be considered is its legal effect."

ing upon which the trial was had and which was not amended or withdrawn must be deemed proven as judicial admissions and must be assumed against the pleader. Larson Co. v. Wrigley Co., 7 Cir., 253 F. 914; Greer v. Davis, 177 Ark. 55, 5 S. W. 2d 742; Clark-Montana R. Co. v. Butte & Superior Co., D. C. 233 F. 547-559; Butte & Superior Copper Co. v. Clark-Montana Realty Co., 9 Cir., 248 F. 609; Id., 249 U. S. 12, 39 S. Ct. 231, 63 L. Ed. 447; Jeffress v. New York Life Ins. Co., 4 Cir., 74 F. 2d 874, 876; Aiken Mills v. Boss Mfg. Co., 2 Cir., 65 F. 2d 344, 374; Turfitt v. Perales, 5 Cir., 63 F. 2d 659; Standard Acc. Ins. Co. v. Rossi, 8 Cir., 52 F. 2d 547, 548; Id., 8 Cir., 35 F. 2d 667, 670; Euclid Candy Co. v. Bank, 6 Cir., 48 F. 2d 757; Pullman Co. v. Bullard, 5 Cir., 44 F. 2d 347; Axelrod v. Osage O. & R. Co., 8 Cir., 29 F. 2d 712, 729; Sebastian Bridge Dist. v. Hedrick, 8 Cir., 4 F. 2d 346, 348."

Darling Shops v. Brack, 8 Cir., 95 F. 2d 135, 141.

Where interrogatories are filed for the purpose of obtaining discovery, the party's answers have the force of judicial admissions in the suit in which they are made, 31 C.J.S. 1086, § 309; 22 C.J. 342, § 389. Every Court takes judicial notice of its own records in the same case: *The Golden Gate,* 9 Cir., 286 Fed. 105, 106; *Kelly v. Johnston,* 9 Cir., 111 F. 2d 613, 615; *McDonough v. Owl Drug Co.,* 9 Cir., 75 F. 2d 45, 51.

"In a case on trial in any court its records are actually or constructively before the judge. He will therefore take judicial notice of them and the facts which they establish".

31 *C.J.S.* 620.

The doctrine of judicial admissions connotes, of course, use of the matter *against* the party making the statement, and hence affords no ground for use of his statement *by* the party, because it then becomes "a self-serving statement free from the hazards of cross-examination", *Bailey v. New England Mut. Life Ins. Co.,* 1 F.R.D. 494, 495, col. 2. At bar, the Court below in judicially noticing the answers to interrogatories could and did disregard appellant's legal opinions and conclusions with which his answers were sprinkled.[22]

The findings, to which we next turn, are supported by (1) the judicial admissions in appellant's answers, and (2) the stipulation.

The findings and judgment. (R. 42 to 44.)

The Court finds:

"1. * * *

2. On March 31, 1942, the defendant, doing business in the City and County of San Francisco, State of California, sold and offered to sell, as a manufacturer, rebuilt automotive parts. On said date, the Federal Manufacturers' Excise Tax was not added by defendant to the price paid by the purchasers of said rebuilt automotive parts; nor was said tax then considered or included by defendant in his calculation of producing costs as a basis of arriving at his ceiling prices.

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[22]At R. 13, that collection of the excise tax amounted to "a price increase of 5%". At R. 14, "Defendant does not satisfy the condition" of MPR 452, and that collection of the tax was a collection of increase in "price". At R. 15, that the amounts in the monthly returns to the Bureau of Internal Revenue were "amounts * * * in excess of defendant's maximum price under" MPR 452.

3. Subsequent to the 2nd day of September, 1943, and prior to the filing of the Complaint in the above-entitled action on the 2nd day of August, 1944, the defendant, doing business in the City and County of San Francisco, State of California, sold and offered to sell, as a manufacturer, rebuilt automotive parts at ceiling prices, and, in addition, defendant collected, from the purchasers thereof, sums totalling $8359.00 to cover the Federal Manufacturers' Excise Tax. None of said sales were made for use or consumption other than in the course of the trade or business of the purchasers.

4. The said tax was levied by section 606 of the Revenue Act of 1932, and in an amended form was codified in 1939 in section 3403(c) of the Internal Revenue Code, but prior to September 1, 1943, the Collector of Internal Revenue made no attempt to collect the said tax from, and it was not paid by, the defendant. On or shortly before September 1, 1943, the Bureau of Internal Revenue specifically instructed the defendant to commence paying said tax on all sales of rebuilt automotive parts and accessories beginning September 1, 1943, which the defendant did in the aggregate of $8359.00 mentioned in paragraph 3 hereinabove; and the amount of $25,077.00 mentioned in the second count of plaintiff's complaint is merely a trebling of said tax aggregate of $8359.00.

CONCLUSIONS AND JUDGMENT.

1. The Court concludes and adjudges that the plaintiff shonuld take nothing and that the plaintiff's complaint be dismissed, with costs to defendant.

2. The clerk of this court is directed forthwith to enter the judgment by notation thereof in the civil docket pursuant to Rules 58 and 79(a), FRCP."[23]

ARGUMENT.

I.

APPELLEE'S BASE DATE PRICES WERE NOT INCREASED.

Appellant's argument under his heading I begs the question by assuming that appellee increased his "base date" prices. He did not. There is neither evidence nor finding that appellee ever charged or collected a price in excess of his "base date" prices.

Under Section 6 of the Regulation,[24] if a manufacturer "Had a list price for the part being priced in effect on March 31, 1942", which is appellee's situation, then Section 6 "sets" his "maximum prices for sales" at those list prices. It is Section 6, not Section 15, that "sets maximum prices". Section 15 relates only to collection, by a seller, of a tax in addition to the *price*.

The language used in the taxing statute, i.e., in substance, "a tax imposed upon articles sold by the manufacturer", is language used over a long period of years in a succession of revenue acts,[25] and with respect to

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[23]See *Haddock v. Pillsbury*, 9 Cir., 155 F. 2d 820, and contrast the order for judgment there with the one here at R. 41.

[24]MPR 452, "Manufacturers' Maximum Prices for Automotive Parts", originally issued August 19, 1943. Under our "Statement of the Record", supra, see sub-heading "Maximum Price Regulation 452".

[25]Citations to the excise sections of the acts of 1917, 1918, 1921, 1924 and 1926, are collected in *U. S. v. Gamble-Skogmo*, 8 Cir., 91 F. 2d 372, 375, col. 2.

many species of "articles"; and under the Revenue Act of 1924 it was given the following analysis and explanation in *Indian Motorcycle Co. v. U. S.*, 283 U.S. 570, at 573-574:

> "Both parties rightly regard the tax as an excise, and not a direct tax on the articles named. But they differ as to the transaction or act on which it is laid. Counsel for the plaintiff insist it is on the sale. Counsel for the government regard it as laid on manufacture, production or importation, or, in the alternative, on any one of these *and* the sale. We think it is laid on the sale, and on that alone. It is levied as of the time of sale and is measured according to the price obtained by the sale. It is not laid on all sales, but only on first or initial sales—those by the manufacturer, producer or importer. Subsequent sales, as where purchasers at first sales resell, are not taxed. Counsel for the government base their contention on the requirement that the tax be paid by 'the manufacturer, producer or importer;' but we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales, and that it does not reflect a purpose to base the tax in any way on manufacture, production or importation."

In short, it is a sales tax on the first sale of a manufactured article, but not upon any subsequent resale. It is an excise on the article sold, and the amount of the excise is simply *measured* by the selling price. Out of that measurement there had grown up differences in commercial practices, the tax being billed as a separate item in the sale invoices of some manufacturers to their customers, while other manufacturers simply invoiced, with-

out invoice separation of the tax, at what came to be called a composite price.[26] And on occasion, still others through either ignorance or design simply overlooked or ignored the tax, i.e., did not consider it in calculation of cost of production and sale, nor invoice it to customers either as a separate item or in a composite price.

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[26]The phrase traces to Justice Cardozo. See *Golding Brothers Co. v. Dumaine*, 1 Cir., 93 F. 2d 162, at 164, 115 A.L.R. 664, at 666, where it is said: "It seems to be well settled that, where a sales contract provides that the purchaser is to pay a stated price and that alone, the purchaser cannot recover from the seller the amount of the tax, if the tax is later done away with by a repeal of the statute or by its being declared unconstitutional, or, if the tax is simply reduced, recover the amount of the reduction, even though the tax had not been paid by the vendor, or, if paid, refunded to him. Zinmaster Baking Co. v. Commander Milling Co., Minn., 273 N.W. 673; Cupples Co., Mfrs. v. Mooney, Mo. App., 25 S.W. 2d 125; Moore v. Des Arts, 1 N.Y. 359; Kastner v. Duffy-Mott Co., 125 Misc. 886, 213 N.Y.S. 128; Christopher v. Hoger & Co., Inc., 160 Misc. 21, 289 N.Y.S. 105; Texas Company v. Harold, 228 Ala. 350, 153 So. 442, 92 A.L.R. 523; Casey Jones, Inc. v. Texas Textile Mills, Inc., 5 Cir., 87 F. 2d 454; Heckman & Co., Inc. v. I. S. Dawes & Son Co., Inc., 56 App. D.C. 213, 12 F. 2d 154. This distinction is clearly pointed out in Wayne County Produce Co. v. Duffy-Mott Co., 244 N.Y. 351, 155 N.E. 669, by Mr. Justice Cardozo, then Chief Justice of the Court of Appeals of New York. In that case it appeared that the purchaser had contracted to pay a certain price for the goods, plus a tax of 10 per cent. It was there said: 'This is not a case where the item of the tax is absorbed in a total or composite price to be paid at all events. In such a case the buyer is without remedy, though the annulment of the tax may increase the profit to the seller. Moore v. Des Arts, 1 N.Y. 359. This is a case where the promise of the buyer is to pay a stated price and to put the seller in funds for the payment of a tax besides. In such a case the failure of the tax reduces to an equivalent extent the obligation of the promise.' Many of the other cases cited above draw the same distinction and point out that, where the item of the tax is absorbed in the total or composite price, the buyer is without remedy, though the annulment of the tax may increase the profits of the seller." The report of the case in 115 A.L.R. 664, is followed by a note at page 667: "Rights of buyer and seller inter se as affected by invalidity of, or subsequent changes or developments with respect to, tax."

After some conflicting decisions[27] in the lower Federal Courts, the Supreme Court in 1929 in *Lash's Products Co. v. U. S.*, 278 U.S. 175, said:

> "This tax was paid by the petitioner, calculated at 10 per centum of the sum actually received by it for the goods sold. But the petitioner had notified its customers beforehand that it paid the 10 per cent tax, and it contends that in this way it passed the tax on, and that the true price of the good was the sum received less the amount of the tax. The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. Heckman & Co. v. I. S. Dawes & Son Co., 56 App. D.C. 213, 12 F. (2d) 154. The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all. Still the question as to the meaning of the statute remains.
>
> The petitioner supports its position by a regulation of the commissioner that when the tax is billed as a separate item it is not to be considered as an increase in the sale price. Naturally a delicate treat-

[27]Stated as follows in the concluding paragraph of the brief for the United States in the case of *U. S. v. Lash's Products Co.*, 278 U.S. 175: "Several cases in the lower Federal courts have involved claims similar to that of the petitioner in the present case. In *Clicquot Club Co. v. United States*, 13 F. (2d) 655, the District Court for Massachusets decided in favor of the taxpayer, and no appeal was taken. In *Elmer Candy Co., Inc. v. Fauntleroy, Collector*, 19 F. (2d) 664, the District Court for the Eastern District of Louisiana decided in favor of the Collector. The judgment of the District Court was reversed by the Circuit Court of Appeals for the First Circuit, 24 F. (2d) 95. Certiorari was granted by this Court May 28, 1928, and the case is now pending as *Fauntleroy v. Elmer Candy Company, Inc.* [278 U.S. 664], No. 119, October Term, 1928. In *White Rock Mineral Springs Co. v. Edwards*, 23 F. (2d) 539, the District Court for the Southern District of New York decided in favor of the Collector."

ment of a tax on sales might seek to avoid adding a tax on the amount of the tax. But it is no less natural to avoid niceties and to fix the tax by the actual price received. Congress could do that as properly as it could have added one-tenth to the tax on the price as fixed by the other items determining the charge to the buyer. The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore, it is part of the price, and if the statute were taken literally, as there would be no reason for not taking it if it were now passed for the first time, there might be difficulty in accepting the commissioner's distinction even if the tax were made a separate item of the bill. But if, in view of the history in the solicitor general's brief, we assume with him that the practice of the commissioner has been ratified by Congress, we agree with his argument that the petitioner must take the privilege as it is offered. It did not bill its tax as a separate item, and the commissioner's regulations notified it that 'if the sales price of a taxable beverage is increased to cover the tax, the tax is on such increased sales price,' although they purported to make a different rule 'when the tax is billed as a separate item.' There has been some difference of opinion in the lower courts, but we regard the interpretation of the law as plain."

Reflection upon that quoted passage discloses that the Court settled the conflict simply by drawing a technical line of gossamer fineness between the tax and the economic burden of the tax. Clearly, in the cited case, the manufacturer "passed the economic burden[28] on", even

[28]See *Cudahy Packing Co. v. U. S.*, 7 Cir., 126 F. 2d 429.

if technically it could not be said that he "passed the tax on". And in the very first revenue act enacted after that decision of 1929 the Congress, through the Revenue Act of 1932, destroyed the gossamer line. In that Act, § 619(a), now I.R.C. § 3441(a), the Congress enacted that in "determining the *price* for which an article is sold * * * there shall be *excluded* the amount of tax * * * whether or not stated as a separate charge". (And see the quotation from the committee report, supra.[29]) Since 1932 "price" is not to be held as including "tax"; price and tax are things separate and apart, at least ever since 1932.

In *U. S. v. Jefferson Electric Mfg. Co.,* 291 U.S. 386, the Court had before it a group of cases from lower Federal Courts which, said the Court (291 U.S. at 392), contained "three lines of decision"; and at page 395 said, "We are of opinion that the view taken in the third line of decisions is right". The principal case in that line is *Boyle Valve Co. v. U. S.,* Ct. Cl., 38 F. (2d) 135, wherein a manufacturer's claim for a tax refund turned *inter alia* on whether he had passed the tax or tax burden on; and wherein *inter alia* it was said (38 F. (2d) at 137):

> "The determination whether the tax was collected by the manufacturer directly or indirectly from the purchaser; that is, whether it was added to the purchase price of the article upon the sale of which the tax was imposed, either as a separate item or as a part of the sales price, is an ordinary question of fact; one with respect of which the courts constantly review the Commissioner's determination and one

[29]Under our Statement of the Record, sub-heading, "The excise tax".

that is involved in almost every suit for refund. It is a question of a type requiring no particular skill or knowledge of accountancy, but merely the ability to weigh evidence and to determine when to believe a witness.

The report of the Ways and Means Committee of the House with reference to section 424 of the Revenue Act of 1928 makes it clear that the purpose of this section was to prevent the refund of excise taxes to a manufacturer when the manufacturer had not paid the tax, but had passed it on directly to the consumer, and had acted merely as a collecting agency; that a refund, under such circumstances, to the manufacturer would unjustly enrich such manufacturer who had not borne the tax but had merely collected it from the persons to whom the articles were sold."

The question, then, whether a manufacturer has "collected a tax" from his customer by burying the tax in his "price" is a simple question of fact. At bar, the Court below found that on the base date in March 1942 the tax "was not added by" defendant-appellee "to the price paid by the purchasers of" the excised articles; "nor was said tax then [in March 1942] considered or included by" defendant-appellee "in his calculation of producing costs as a basis of arriving" at his selling prices. The finding is supported by (1) appellant's answers to appellee's interrogatories and (2) the stipulation.

In short, our base date prices under Price List No. 5 were *not* changed or increased by Price List No. 6, but the latter simply stated, "with Federal Excise Tax in-

cluded",[30] i.e., a separate item of 5% "Federal Excise Tax" was *then* added to the "price". Appellant's argument (his page 5) that "There is no showing in the record that defendant obtained Office of Price Administration approval for his Price List No. 6 of September 1, 1943", begs the question. No approval is necessary under Section 6 of the Regulation when the base date price is not increased. Increase of price differs fundamentally and clearly from initiation of the collection of a sales tax.

A sales tax was not involved in the two cases cited by appellant at his pages 8 and 9. In the first one cited, *U. S. Gypsum Co. v. Brown,* 137 F. (2d) 360, the question was with respect to who, as between seller and buyer, should "bear the burden of the transportation tax of 3%" imposed by section 620 of the Revenue Act of [October 21] 1942, which the Act "imposed upon the amount paid * * * for transportation * * * from one point in the United States to another". The seller's base date prices in March 1942 for sales of its "products from its plant at Midland", California to purchasers in the three states of California, Nevada and Arizona, were under one or the other of "two sharply distinct methods of pricing". One was "f.o.b. the Midland mill", in which case the burden of the freight from the mill to destination" was upon the buyer, and the Court said, "The Price Administrator concedes that in the case of these f.o.b. mill sales the purchaser must bear the burden of the transportation tax", which concession and ruling is *against* the appellant

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[30]See our quotation of appellant's answers to our interrogatories, supra, under the sub-heading, "The issue under appellant's claim as narrowed by him".

in the case at bar, in so far as any analogy may be attempted between a sales tax and a freight tax. The other pricing method was a *delivered* price, i.e., f.o.b. destination, under which the seller absorbed the cost of delivery under a delivered price that was uniform throughout the three states regardless of distance from the mill or varying costs of deliveries in the three-state area. The other case, *Galban Lobo Co. v. Henderson,* 132 F. (2d) 150, went off on similar grounds with respect to "a 22% surcharge on ocean freight rates for transporting sugar from Cuba to the United States Atlantic and Gulf ports", in the case of a Cuban seller of raw cane sugars on a "duty paid cost and freight basis".

More directly in point is a case not cited by appellant: *Bowles v. Stapleton,* D. C. Colo., 53 F. Supp. 336, the case of the excise tax of two cents a quart imposed in 1943 under an ordinance of the City of Denver on sales at retail of fluid milk in the city. The sellers of milk collected from milk buyers the two cents a quart in *addition* to their maximum base date price (March 31, 1942), and Judge Symes rejected the Administrator's contention that the sales price plus the excise could not lawfully exceed the base date "price" of March 31, 1942.

Appellant mis-states the controversy in stating, at his page 5, that "Defendant, however, seeks to derive authority for his new price list from the provisions of Section 15 of the Regulation". It was not a list of new prices, but simply a restatement of unchanged old prices of the base date (March 31, 1942), with the 5% tax now added to the base date price. The controversy is simply this. We did not seek to "derive authority" from Section 15.

Appellee's "authority" derived from Section 6, i.e., his price all along remained at his base date price. Appellant came into the Court below as a plaintiff and thereby assumed a plaintiff's burden of allegation and proof. The "claim" upon which he sought relief was made in a general allegation that appellee, as a manufacturer, sold automotive parts "at prices in excess of" MPR 452. Under that Regulation maximum *prices* are set by Section 6. Section 15 does *not* set prices, but relates solely to collection of *taxes*. Hence, appellee "derives authority" for prices from Section 6, and appellant's original burden as a plaintiff and his present burden as an appellant is a burden on *him* to show a violation of Section 6. In the Court below the first mention of Section 15 occurred when appellant as a plaintiff sought to shift his ground from the loose, general mention of "price" in his complaint, to the narrower ground of "excise tax", coupled with his citation and quotation of Section 15, in his answers to our interrogatories 3, 4 and 5. (See R. 13 and 14.) The procedural situation is therefore, in substance, that appellant as a plaintiff initiated a controversy whether appellee was prohibited by Section 15 from adding the tax to his permitted price under Section 6.

There are two independent reasons why Section 15 is not a good ground for appellant's suit for damages:

1. Even though it be assumed that Section 15, properly construed, was breached, there is no authority for a civil suit by appellant for damages for such breach. Appellant's power to sue, and the authority of the Court below to entertain a suit by him, are wholly statutory. The statutory basis of that power and authority are clearly

summarized in *Bowles v. American Distilling Co., et al.*, D.C. N.Y., 62 F. Supp. 20, which was an action by the Administrator for damages for deceit practiced upon him in the course of fixing of maximum prices by him, through false entries in the business records of the defendants. In the course of holding that the power to sue, and authority to entertain the suit, were absent, the Court said (62 F. Supp. at 23):

> "Section 24(1) of the Judicial Code confers upon the district court jurisdiction, 'of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue.' The Administrator is by law authorized to sue; but the nature of the proceedings he may initiate are specifically enumerated in the Act: (1) He may apply to the district court for an order in aid of his subpoena, 202(e); (2) he may sue for an injunction or for an enforcement order, 205(a); (3) he may certify the facts to the Attorney General when he has reason to believe that a criminal violation has been committed under the Act, 205(b); (4) he may intervene in actions between third parties where the Act or a regulation is the ground of claim or defense, 205(d); (5) he may institute treble damage actions 'on behalf of the United States', 205(e); (6) he may sue for the suspension of a license, 205(f); (7) he may petition the Supreme Court for a writ of certiorari to review a judgment of the Emergency Court of Appeals, 204(d).
>
> Nowhere, in this meticulously arranged arsenal of weapons at the disposal of the Administrator, do I find power to bring common law actions for deceit. It would seem too clear for argument that the words of Section 24(1) of the Judicial Code, 'authorized by

> law to sue' do not mean to sue in general but to prosecute the specific action under consideration."

Looking over that "arsenal of weapons" it is clear that the present suit for damages must rest upon Section 205(e), if it has any statutory support. That subsection authorizes suit, "If any person selling a commodity violates a regulation, order, or price schedule *prescribing a maximum price or maximum prices*". MPR 452 is, of course, such a "regulation" or "order", but it "prescribes a maximum price or maximum prices" only in Section 6, and the proof and findings at bar do not disclose any violation of Section 6. The authority to make the "regulation" or "order" came from Section 2(a) of the Price Control Act, which provides that the Administrator "may by regulation or order establish such maximum price or maximum prices". The authority for Section 15 of MPR 452, however, comes from a different source, i.e., Section 2(g) of the Price Control Act, "Regulations, orders and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the *circumvention or evasion* thereof". A violation of a subsidiary regulation made pursuant to Section 2(g) is made unlawful under Section 4, and may be reached in a variety of ways, civil and criminal, by the Administrator or the Attorney General, but nowhere in the Act will be found authority for a civil suit for damages for violation of a subsidiary regulation promulgated under Section 2(g).

2. It is clear that there is a *casus omissus* in § 15 of MPR 452, which "is not unusual, particularly in legisla-

tion introducing a new system", *U. S. v. Weitzel,* 246 U. S. 533, 534. "A *casus omissus* does not justify judicial legislation", *Ebert v. Poston,* 266 U. S. 546, 554. Subsection (b) of § 15 of MPR 452 covers excises levied under any statute "becoming effective on or after March 31, 1942", and therefore does not touch the case at bar. Subsection (a) of § 15 extends to a tax or excise levied before March 31, 1942, but only if the manufacturer *added* it to his price on March 31, 1942. It is clear that § 15 of MPR 452 does not reach (i. e., there is a *casus omissus* in) the case of an excise or tax levied before March 31, 1942, but which tax or excise, because of dispute or controversy about it or for any other reason or without reason, was not collected or paid by a manufacturer, nor added to or buried in his price, nor collected either directly or indirectly from his customers, i.e., neither the tax nor the economic burden of it was "passed on" to buyers or consumers.

Plaintiff expressly admits in his answers to interrogatories that defendant "*did not add* a Manufacturer's Excise Tax to his price on March 31, 1942". § 15(a) is *inapplicable* as a basis of the action, because it relates *only* to "any tax * * * which the manufacturer on March 31, 1942, *added* to the price". It is clear from the answers to interrogatories that the Bureau of Internal Revenue never collected the excise tax from defendant prior to September 1, 1943, at which time "defendant in accordance with specific instructions from the Bureau of Internal Revenue commenced paying said Manufacturer's Excise Tax on all sales of rebuilt automotive parts and accessories beginning September 1, 1943". Therefore, since § 15(a) of MPR 452

is inapplicable, and no other basis of liability is stated or shown, the action must necessarily fail.

The question is not one of validity or invalidity of Section 15 of MPR 452, but is a question of interpretation, and hence is open to this Court: *Bowles v. Seminole Rock & Sand Co.,* 5 Cir., 145 F. 2d 482, 484, col. 2; *Bowles v. Eastern Sugar Associates,* 64 F. Supp. 509, 511. And at page 513 of the latter case it is said:

> "Although the draftsmanship displayed in the regulations which we have just analyzed is inexcusably poor and creates a situation which is calculated to befuddle even the most astute legal mind, not to speak of the general public with respect to whom the regulations are promulgated, we believe, nevertheless, that the fairest interpretation to be placed upon them, considered as a whole, is that interpretation which counsel for the Sugar Company have insisted upon, because it has the merit of applying a literal interpretation to plain words when found to be in conflict with other plain words if likewise literally interpreted. In short, we believe that **if the Office of Price Administration, in drafting its regulations, is unable to say what it means in reasonably clear language, the public should not be penalized, but should be given the advantage of the ambiguity.**"

Appellant's argument at his page 13, i.e., that appellant is still liable for the excise and if he pays it will have to "absorb" it, is wholly specious. Appellant's statutory right of recovery must depend upon *his* right under the Price statute, not upon a claim of right in the Bureau of Internal Revenue under the tax statutes. It is not for appellant Administrator to reach out into usurpation of

the functions of the Bureau of Internal Revenue. Appellee's liability to pay the excise on sales during March, 1942, is not at bar in issue nor within the scope of the pleadings, stipulation or findings; and *non constat* whether the Collector of Internal Revenue approves the present litigation or is in either sympathy or conflict with appellant's theories in the suit at bar. Appellee will have a right to a day in Court *if* and when he is ever pursued by a *tax* collector. Until such pursuit there is nothing for appellee to "absorb" with respect to sales in March, 1942.

The plaintiff Price Administrator has no jurisdiction over the enforcement of collection of taxes or excises. His jurisdiction is over prices, which is a wholly different subject matter. The grant of jurisdiction to him is in the opening sentence of § 2(a) of the Emergency Price Control Act of 1942 (50 USC § 902(a)), and reads:

> "Sec. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum *price* or maximum *prices* as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."

Most wisely, the Congress reserved to itself and to the Bureau of Internal Revenue sole jurisdiction over taxes and excises.

The statutory authority to sue given under the Price Control Act, § 205(e) (50 USC § 925(e)), is addressed to

an overcharge in price, not to the addition or collection of a tax. The present suit is outside the authority given by the Congress.

II.

THE RECORD DOES NOT OPEN TO REVIEW THE RULING OF THE COURT BELOW ON APPELLANT'S INTERROGATORIES.

The interrogatories put by appellant to appellee appear at R. 17 to 19. In substance they inquire whether defendant added the excise to the price paid by his customers on March 31, 1942, and if so, the details of the sales; if not, when did payment of the excise by defendant begin, and the details of sales and excise amounts during the period of payment.

Now, *after* the sustaining of our objection to those interrogatories appellant entered into a *stipulation* with appellee completely embracing the whole of the specific subject matter of the interrogatories. The stipulation rendered the interrogatories *functus officio*. The interrogatories became simply a dead branch of the procedural tree. The doctrine of *functus officio* is "applied to something which has once had life and power, but which has become of no virtue whatsoever", 37 *C.J.S.* 1401. By writing the stipulation appellant wrote the answers to his own interrogatories. In *Moberg v. McCauley*, 273 Pac. 739, at 740-741, 150 Wash. 494, the Court said:

> "Appellant's first contention is that the court erred in striking the interrogatories. It is insisted that Rem. Comp. Stat. § 1225, providing for the examination of

any party to an action as a witness, and that he may be compelled to testify as any other witness, and Rem. Comp. Stat. § 1226, providing that, instead of the examination being had at the trial, either party, after filing his pleadings, may serve interrogatories for the discovery of facts and documents material to the support or defense of his action, compulsorily required the interrogatories to be answered.

The interrogatories chiefly asked about the taxes, assessments, and mortgages on the two properties, and the amounts of money paid to appellant's testator for the deeds, which she alleges in her own complaint. As to the taxes, assessments, and mortgages, they were matters of public record. As to the consideration paid for each lot, appellant herself alleged the consideration. Respondent was a witness at the trial, and was fully examined as to all the details of their transactions. **The only object of the interrogatories has been accomplished.** We can, therefore, find no abuse of discretion or prejudicial error in striking the interrogatories. Du Clos v. Batcheller, 17 Wash. 389, 49 P. 483; Brooke v. Boyd, 80 Wash. 213, 141 P. 357, Ann. Cas. 1916B, 359; Will v. Domer, 134 Wash. 576, 236 P. 104."

And it was said in *Brooke v. Boyd,* 141 Pac. 357, 358, 80 Wash. 213:

"Furthermore, the case is before us on the findings of fact made by the trial court, which the appellant says in his brief are full and substantially accurate. This being true, the appellant cannot have been prejudiced by the ruling of the court, since the only object sought by the interrogatories has been accomplished."

If the ruling of the Court below was erroneous, the error became harmless. The stipulation rendered the question abstract or moot. The ruling, however, was correct for the reasons stated in *Bowles v. Trowbridge,* 60 F. Supp. 48;[31] *Bowles v. Farmer's Nat. Bank,* 147 F. 2d 425; *Bowles v. Montgomery,* D.C. Pa., 66 F. Supp. 889; *H. Wagner & Adler Co. v. Mali,* 74 F. 2d 666, 670, cut-in 11. Appellant's brief relies heavily upon *Helvering v. Mitchell,* 303 U. S. 391, which was a ruling in a different context. The United States is "a body politic and corporate", *Helvering v. Stockholms Enskilda Bank,* 293 U. S. 84, 92. Compare *U. S. v. Cooper Corp.,* 312 U. S. 600. It was in its corporate capacity, as proprietor of the federal fisc, that the United States (through the Commissioner of Internal Revenue) was a party litigant in *Helvering v. Mitchell,* supra (303 U. S. 391). It was the proprietor or federal fisc owner of an ordinary income tax claim, a pecuniary claim, against Mitchell for $728,709.84, collection of which was being obstructed by the debtor Mitchell. The public corporation or body politic sought to enforce its civil rights as a money claimant by the additional civil remedy ("remedial sanction") of a 50% addition of $364,354.92 to the primary tax claim or money debt owing by Mitchell, the addition having been authorized, "sanctioned", by the Congress. *Held,* that Mitchell's contention of double jeopardy was bad, because the 50% was a civil remedy of the United States, a "civil sanction", a "remedial sanction" (303 U. S. at 399) and not a "criminal penalty".

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[31]This is the opinion in the case at bar, printed at R. 21 et seq.

That the foregoing is the true context of *Helvering v. Mitchell* is illuminated and made perfectly clear in the later case of *U. S. v. Hess,* 317 U. S. 537, at 549-550, where the Court cited *Helvering v. Mitchell* and explained the true ground of decision as follows:

> "It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction. The statutes on which this suit rests, make elaborate provision both for a criminal punishment and a civil remedy. Violators of § 5438 may 'be imprisoned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars.' We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it. Helvering v. Mitchell, supra (303 U.S. 401, 82 L ed 923, 58 S Ct 630).
>
> It is, of course, well accepted that for one act a person may be liable both to pay damages and to suffer a criminal penalty. Long ago, this Court said, 'A man may be compelled to make reparations in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offense.' Moore v. Illinois, 14 How (US) 13, 19, 20 14 L ed 306, 308, 309. Congress has 'power to give an action for damages to an individual who suffers by breach of the law.' Chattanooga Foundry & Pipe Works v. Atlanta, 203 US 390, 396, 397, 51 L ed 241, 244, 245, 27 S Ct 65. And it has this same power when it, rather than some private individual, is injured by a fraud. Quite aside from its interest as preserver of

> the peace, the government when spending its money has the same interest in protecting itself from fraudulent practices as it has in protecting any citizen from frauds which may be practiced upon him. 'The powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection.' Cotton v. United States, 11 How (US) 229, 231, 13 L ed 675, 676."

The classification of wrongs into the two species of private wrongs and public wrongs as supplying the true test of whether a law is penal in the strict and primary sense is applicable here. If the United States were the buyer of a commodity and paid for it at a price in excess of OPA ceiling, and thereupon brought suit in its own name or through the OPA Administrator, then its complaint would show a private wrong to it and trebling the amount of the damage to it would be a remedial or civil sanction; but when *it* sues because some member of the public has overpaid, it sues for "a wrong to the public" as distinguished from a "wrong to the individual", and hence the latter suit is penal in the strict and primary sense. When the United States is itself an overcharged buyer, the "national economy" is damaged in a direct, pecuniary and understandable sense; when a member of the public is overcharged, we can understand how the particular individual's economy is similarly damaged, but to say in the individual's case that "the national economy" is *damaged*

is simply the creation of a fog, of no aid whatever to either legal analysis or sound judicial decision.

Dated, San Francisco, California,
November 6, 1946.

Respectfully submitted,
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